

March 3, 2003

Gene Merriam
Commissioner
Minnesota Department of Natural
Resources
500 Lafayette Road
St. Paul, Minnesota 55155-4047

RE: In the Matter of the Appeal of the Trespass Citation Issued to Daniel Jon Olson;
OAH Docket No. 11-2000-15244-2

Dear Commissioner Merriam:

On January 31, 2003, a hearing was held by telephone on the trespass citation listed above. Daniel J. Olson appeared and testified on his own behalf. Deputy Sheriff Todd Schwanke and Rodney Peach, the son of the landowner, testified in support of the citation. Both parties agreed that the hearing could be held by telephone rather than in-person. The hearing was tape-recorded. Prior to the hearing, a prehearing conference was held on January 17, 2003. Mr. Olson and Deputy Schwanke participated in the prehearing conference, which was also tape-recorded.

The issue presented is whether, on November 19, 2003, Mr. Olson shot at a pheasant while standing within 500 feet of a building occupied by a human without the written permission of the owner, in violation of Minn. Stat. § 97B.001, subd. 7(a). ^[1] That statute specifies that "[a] person may not take a wild animal with a firearm within 500 feet of a building occupied by a human or livestock without the written permission of the owner, occupant, or lessee . . . on another person's private land; or . . . on a public right-of-way." There is a factual dispute about how close Mr. Olson was to the dwelling when he fired his shotgun.

The facts are as follows: On November 19, 2002, Mr. Olson was hunting for pheasants in West Concord, Minnesota, which is located in Steele County. The property at issue is located along 71st Street Northeast, which is a gravel road running east-west. There is a ditch along each side of the road and agricultural land to the north and south of the road. The land in this area is

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owned by the Peach family. Rodney Peach lives a short distance down 71st Street; his mother owns the property involved in this citation which is located on the north side of the road; and his father owns the land on the south side of the road. Rodney Peach was working in a shed located on the east side of his mother's property on the day in question. Three rows of evergreen trees have been planted in an east-west arrangement to the west and north of Mrs. Peach's home. The first line of trees begins 10-15 feet from the ditch, and there is approximately ten feet between each line of trees. Mr. Olson did not have permission to hunt on Mrs. Peach's property.

While driving, Mr. Olson spotted a pheasant in the ditch on the north side of the road. He turned around in Mrs. Peach's driveway and parked his truck on the north side of the road, in front of the treeline to the west of Mrs. Peach's house. Mr. Olson got out of his truck, let his dog out of the truck, loaded his gun, and walked in a westward direction in the ditch, away from Mrs. Peach's house. The pheasant was running ahead in the tall grass in the ditch, pursued by Mr. Olson's dog. Eventually, the pheasant flew up and Mr. Olson shot it while it was in the air. When he shot at the pheasant, he was standing in the ditch. He shot at approximately a 45 degree angle straight west, parallel to the road. The pheasant was hit, landed on the road, and ran across the road into the plowed field owned by Mr. Peach's father. Mr. Olson's dog retrieved the bird. Mr. Peach, who had been observing from the driveway by his mother's shed, drove over to Mr. Olson in his pick-up truck and a discussion took place about whether Mr. Olson could properly hunt where he did. Both men were angry and each disputes the other's version of what was said. It appears, however, that Mr. Olson contended that he was not trespassing because he was properly hunting in a public right-of-way, and Mr. Peach took the position that Mr. Olson was trespassing because he believed his mother "owned" the ditch and up to the middle of the road. Mr. Peach wrote down Mr. Olson's license plate number and said that he would call the Sheriff's Office. As Mr. Olson was talking to Mr. Peach, his dog walked into the grove of trees near Mrs. Peach's house, and Mr. Olson called him back.

Deputy Schwanke was dispatched to the Peach property after receiving the call from Mr. Peach. Mr. Peach told Deputy Schwanke that Mr. Olson had parked approximately 20 yards from the house, got out of the pick-up, stood in the north ditch, and shot at a pheasant while standing within 20 yards of the house. He said that Mr. Olson's dog had chased the pheasant into the woods north of the road and west of the house. He further claimed that Mr. Olson had said that he knew the County Sheriff and could hunt wherever he wanted. Mr. Peach showed Deputy Schwanke tire tracks that he said belonged to Mr. Olson's truck. Mr. Peach said that Mr. Olson stood just north of the tracks when he shot

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at the pheasant. Deputy Schwanke determined that that would have been well within 500 feet of Mrs. Peach's home. Deputy Schwanke verified that Mr. Olson was the registered owner of the truck and issued a citation to him later that day for shooting

within 500 feet of a dwelling. Mr. Olson admitted that he had shot at a pheasant near Mr. Peach's mother's property but said that he was more than 500 feet away from her house.

There were certain inconsistencies in the testimony of both Mr. Peach and Mr. Olson. Mr. Peach initially testified that Mr. Olson parked his truck next to the treeline, Mr. Olson's dog ran into the trees located on Mrs. Peach's property before the bird took flight, and Mr. Olson took the shot after walking out of the ditch onto the part of the grass that his mother mows. Mr. Peach later testified that Mr. Olson was standing in the ditch in front of his truck when he shot up at the bird, and the truck was parked in front of the treeline. Mr. Peach also agreed under questioning from Mr. Olson that the bird fell across the road, despite apparently telling Deputy Schwanke that Mr. Olson's dog retrieved the pheasant from the trees near his mother's house. It is significant, however, that Mr. Peach consistently testified that Mr. Olson was 40 to 60 feet away from his mother's house when he shot at the pheasant.

The inconsistencies in Mr. Olson's testimony went more directly to the heart of the issue: whether the shot was fired within 500 feet of the house. Mr. Olson initially indicated during the prehearing conference that he parked 80 yards away from Mr. Peach's mother's house. Later during the same prehearing conference, he said he parked 60-80 yards away and walked 100-150 yards away before shooting. If the lower estimates were true (that is, if he parked 60 yards (180 feet) from the house and walked 100 yards (300 feet) before shooting), it is evident that the shot was fired by Mr. Olson's own admission when he was less than 500 feet from the house. During the hearing, Mr. Olson initially testified that he parked 40 yards west of the house and later indicated it was 40-60 yards away. He initially testified that he walked 180-200 yards away from the treeline—then said he walked “a good 100 yards” in the ditch before shooting. Again, if the lower estimates were true (that is, if he parked 40 yards away (120 feet) and walked 100 yards (300 feet) before shooting), the shot would have been fired within 500 feet of the house.

Conclusion: Under the circumstances, it is recommended that the citation be affirmed. A preponderance of the evidence demonstrates that Mr. Olson did in fact take a wild animal with a firearm within 500 feet of a dwelling without the written permission of the occupant, as proscribed by Minn. Stat. § 97B.001, subd. 7(a). Although the credible evidence shows that Mr. Olson was hunting in the public right-of-way and thus was not trespassing on private property at the time,

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the statute still prohibits discharging a firearm within 500 feet of Mrs. Peach's dwelling. Mr. Olson's testimony varied on the critical issue of how far he was away from the house when he fired, and the lower estimates he provided supported the conclusion that he was within 500 feet of the home when he shot at the pheasant. It is evident that Mr. Olson did not intend to violate the law and was, in fact, firing away from the house. The

statutory prohibition is not, however, limited to instances in which a shot is fired in the direction of a dwelling, but more broadly prohibits any sort of hunting within 500 feet of a building occupied by a human.

It is hereby recommended that the Department of Natural Resources affirm the citation issued to Mr. Olson. I am closing our file in this matter. The record will be returned to you under separate cover. The law permits the final decision in this matter to be made by the Commissioner (or his designee). The law^[2] further requires that the Commissioner must wait at least five days after receipt of this recommendation before making that final decision and permits Mr. Olson to make any comments to him on the recommendation within that five-day period. The Commissioner must send a copy of his final decision to Mr. Olson. However, if the Commissioner fails to act within 90 days after the record in this proceeding closes, this recommendation will become the final decision in this matter.^[3]

Sincerely,

/s/ Barbara L. Neilson

BARBARA L. NEILSON
Administrative Law Judge
612-341-7604

cc: Daniel Olson
Dep. Todd Schwanke
Pat Holt, DNR Enforcement

^[1] Although Mr. Peach also contended that Mr. Olson fired his shotgun within 500 feet of livestock in violation of Minn. Stat. § 97B.001, subd. 7(b), the citation issued by Deputy Schwanke alleged only that Mr. Olson had been hunting "within 500 feet of dwelling." Accordingly, that is the only allegation that will be considered.

^[2] Minn. Stat. § 116.072, subd. 6(e).

^[3] Minn. Stat. § 14.62, subd. 2a.